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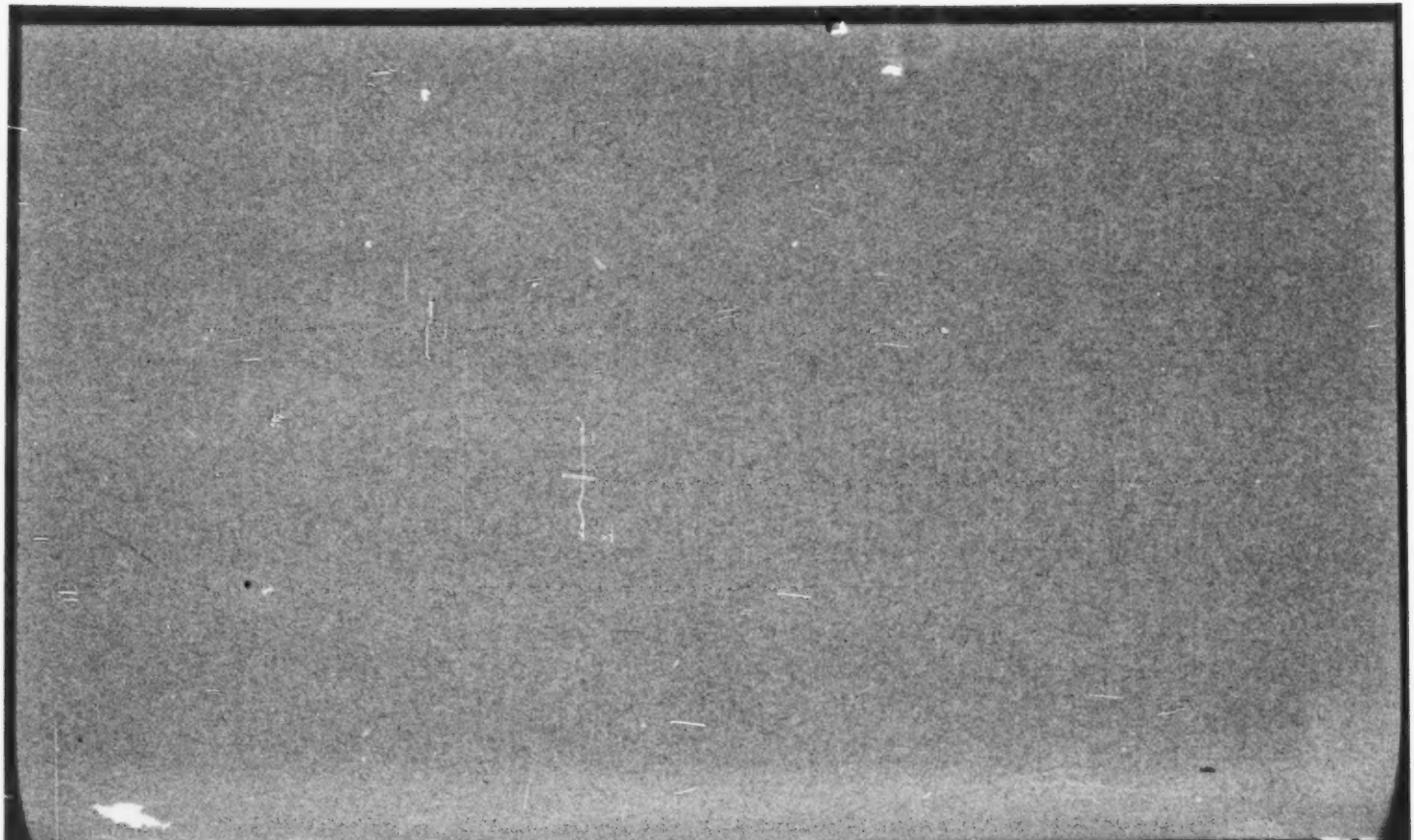

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 97.

MICHAEL F. DOOLEY, as Receiver, etc.,
Plaintiff in Error,

vs.

JAMES PEASE,
Defendant in Error.

Error to Circuit Court of Appeals, Seventh Circuit.

STATEMENT OF THE CASE.

The Natchaug Silk Company was a Connecticut corporation, carrying on the business of manufacturing and selling silk goods at Willimantic, Connecticut.

The First National Bank of Willimantic, Connecticut, as its name implies, was a national bank doing business at Willimantic.

On January 1, 1895, the Silk Company was indebted to the bank in the sum of several hundred thousand dollars. The Silk Company had been long prior to that time hopelessly insolvent, and this fact was known to the bank. (Rec., p. 16; Par. 33.)

One Risley was an officer of said Silk Company, having

entire charge of its financial affairs. (Rec., p. 14; Par. 7.)

About this time, and for the purpose of obtaining credit for the Silk Company, certain false and fraudulent statements as to the assets and liabilities of the company were made up by Risley and were sent to Morimura & Co., and the China and Japan Trading Company (hereinafter known as the attaching creditors), dealers in raw silk, for the purpose of deceiving them as to the condition of the Silk Company and causing them to furnish raw silk on credit to the Silk Company, to be manufactured into goods. (Rec., p. 17; Par. 33.)

The making of these fraudulent statements was participated in by the bank (Risley being the cashier of the bank). Said fraudulent statements indicated that the Silk Company was solvent, and further represented that the said company was about $200,000 better off than it really was. Risley knew the amount of the indebtedness to the bank, and knew that this large indebtedness rendered said company insolvent, but in said statements he falsely and fraudulently concealed such fact. (Rec., p. 17; Par. 33.) Relying upon such statements, said raw silk dealers furnished raw silk to said company on credit, which they would not have done unless they had been deceived by said fraudulent statements. (Rec., p. 17; Par. 33.)

The raw silk thus furnished was manufactured into silk goods, a large portion of which (Rec., p. 17; Par. 33) were shipped to Chicago to be sold in the regular course of business in the branch store which said Silk Company maintained in Chicago.

On April 23, 1895, the bank failed and Michael F. Dooley was appointed its receiver. (Rec., p. 12; Par. 8.)

12952

On April 22, 1895, one Chaffee, president of the Silk Company, left Willimantic and went to New York, to Chicago and to Baltimore, and in these various places, in the name of the Silk Company, executed bills of sale of all the property belonging to the Silk Company in these different cities. When Chaffee started on this trip, he knew that the company was insolvent and was going into liquidation. (Rec., p. 15; Par. 17.)

This case has to do with only one of said attempted transfers, however, *i. e.*, the one which was attempted to be made in Chicago on April 25, 1895, when Chaffee, president of the company, executed in the name of the company a bill of sale of all the goods in the Chicago store, in favor of Michael F. Dooley, the bank receiver.

As before stated a large portion of the goods thus purporting to be transferred to Dooley was manufactured from the raw silk which had been obtained from these attaching creditors, by means of the false and fraudulent statements aforesaid.

On May 20, 1895, Morimura & Co. began an attachment suit in the Circuit Court of Cook County, Illinois, and pursuant to the writ issued in that case James Pease, sheriff, levied upon these goods in Chicago, as being the goods of said Silk Company. Afterwards, on May 24, 1895, the sheriff again levied upon the same goods by virtue of another attachment writ issued out of the same court against the same defendant, at the suit of China and Japan Trading Company.

Thereupon, Michael F. Dooley, receiver, as aforesaid, brought this suit in trespass against the sheriff for taking and carrying away said goods.

Dooley claims that at the date of the attachment the

goods had ceased to belong to the Silk Company, and had become his property by virtue of the supposed bill of sale, which the president of said company executed in his favor on April 25, 1895.

If the goods were still the goods of the Silk Company on May 20, or if the attaching creditors were at that time entitled to treat them as the goods of the Silk Company, then Dooley's suit fails; for it is admitted that the attachments were in all respects regular and valid.

On the trial below the sheriff contended that the bill of sale conferred no title on Dooley as against these creditors, for four reasons:

First. Because the president of the Silk Company had no authority to execute the bill of sale, and hence no title passed under it.

Second. Because there was no visible, outward or notorious indication of any change in title, or possession of the goods after the execution of the bill of sale, and hence it was fraudulent and void as against attaching creditors.

Third. Because the document executed by the president of the Silk Company, though in form an absolute bill of sale, was in reality merely collateral security, and hence was fraudulent and void as against the attaching creditors.

Fourth. Because the bank joined with the Silk Company in a collusive scheme to make false representations to the raw-silk dealers in order to secure credit for the Silk Company and to conceal the fact that the company was largely indebted to the bank, and that this indebtedness rendered the company insolvent, and hence the bank is estopped from asserting its claim in any form to the

12953

prejudice of the persons whom it deceived by these statements.

Evidence was introduced to support each one of these propositions, and the court below was, therefore, called upon to decide *four questions of fact:*

First. Did the president have authority to execute the bill of sale? (If *the fact* is that the president had no authority to execute the bill of sale, then *the law* is that the title did not pass out of the Silk Company.)

Second. Was there any visible, outward or notorious change in the possession of the goods under the bill of sale? (If *the fact* is that there was no visible, outward or notorious change of possession, then *the law* is that the bill of sale is fraudulent and void as to these creditors.)

Third. Did Dooley cancel any part of the indebtedness as a consideration of the giving of a bill of sale, or was it in reality given only as collateral security, the debt remaining as before? (If *the fact* is that no part of the debt was canceled, and the bill of sale was in reality merely collateral security, then *the law* is that it is fraudulent and void as to these creditors.)

Fourth. Did the bank join with the Silk Company in making false and fraudulent representations to the raw-silk dealers and in fraudulently concealing the fact that the company was largely indebted to the bank and that this indebtedness rendered the company insolvent? (If such were *the facts*, then *the law* is that the bank is estopped from asserting its claim in any form to the prejudice of the persons thus deceived.)

The lower court found the facts to be in favor of the sheriff on all of these propositions.

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court's findings of fact, he has entirely omitted the specific findings which the court made on each of the four questions of fact above mentioned.

On the first point the court found:

"Chaffee (the president of the company) was not vested with authority to make this transfer by the charter of the company, nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors, or by the company, in any manner. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers. He had never made a transfer similar to this prior to starting on his trip, beginning April 22d, on which trip he purported to make the transfer in controversy.

The bank knew and Dooley knew that this act was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company.

Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets, by way of preference, in case of impending dissolution." (Rec., p. 15.)

On the second point the court found:

"There was no change in the title to or possession of said goods which was visible, open or notorious down to the date of the attachments. (Rec., p. 14; Par. 14.) There was nothing in the appearance of the store, outside or inside, to indicate that there had been any change in the title or possession to the goods, on or after April 25th, and until May 20th, the time of the attachment. (Rec., p. 15; Par. 23.) No advertisement was made of the transfer to Dooley, nor was any public notice given thereof. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895.

12954

The change of ownership was not open, or visible, or notorious." (Rec., p. 16; Par. 29, 30, 31.)

On the third point the court found:

"No deduction from or cancellation of the debt to the bank or its receiver Dooley was made at the time of or by reason of the giving of said bill of sale; nor was any deduction from or cancellation of said debt made by said Dooley in his proof of claim against the receiver of said Silk Company, filed April 7, 1896, on account of or by reason of the giving of this bill of sale, although he had received the sum of $7,000 out of the sale of a portion of these goods." (Rec., p. 17; Par. 37.)

On the fourth point the court found:

"For the purpose of obtaining credit for the Silk Company, certain false and fraudulent statements as to the assets and liabilities of the Silk Company were made up by Risley and were sent to Moramuri & Co. and to the China and Japan Trading Company, dealers in raw silk, for the purpose of deceiving them as to the condition of the Silk Company and causing them to furnish raw silk on credit to the Silk Company, to be manufactured into goods. Risley was the cashier of the bank and a director in the bank. Fowler was a director in the bank and a director in the Silk Company. (Rec., p. 16; Par. 33.) Said fraudulent statements indicated that the Silk Company was solvent. Said fraudulent statements represented that said company was about $200,000 better off than it really was. Risley well knew the amount of the indebtedness to the bank, and knew that this large indebtedness rendered said company insolvent, but in said statements he falsely and fraudulently concealed such fact. Relying upon such statements, said raw silk dealers furnished raw silk to the company on credit, which they would not have done unless they had been deceived by said fraudulent statements. The entire amount of the claims of said attaching creditors was for raw silk furnished on the faith of these fraudulent statements. The raw silk thus furnished was manufactured into silk goods, which constituted a large part of the goods attempted to be transferred to Dooley." (Rec., p. 16; Par. 33.)

The facts having been found in favor of the sheriff in the court below, *there was nothing to be reviewed by the Circuit Court of Appeals and there is nothing to be reviewed here*, for no serious dispute is made as to the propositions of law upon which the court below decided the case, if the facts are as found.

12955

BRIEF.

I.

THE FINDINGS OF FACT BY THE LOWER COURT ARE CONCLUSIVE.

U. S. R. S., Sec. 1011.

Distilling & Cattle Feeding Co. v. *Gottschalk*, 13 C. C. A., 618.

Norris v. *Jackson*, 9 Wall., 125.

Martinton v. *Fairbanks*, 112 U. S., 670.

Stanley v. *Supervisors*, 121 U. S., 535.

Hathaway v. *Bank*, 134 U. S., 494.

Runkle v. *Burnham*, 153 U. S., 216.

St. Louis v. *Rutz*, 138 U. S., 226.

Smiley v. *Barker*, 83 F. R., 684.

II.

THE QUESTION AS TO THE POWER OF THE PRESIDENT TO MAKE THE TRANSFER IS ONE OF FACT.

III.

A DETERMINATION OF MIXED QUESTIONS OF LAW AND FACT CANNOT BE REVIEWED.

Norris v. *Jackson*, 9 Wall., 125.

Dennistoun v. *Stewart*, 18 How., 565.

Jewell v. *Knight*, 123 U. S., 426.

Smith v. *Kraft*, 123 U. S., 436.

Fire Ins. Co. v. *Wickham*, 128 U. S., 426.

IV.

CHAFFEE HAD NO POWER TO MAKE THIS TRANSFER.

First Nat. Bank v. *Co.*, 116 N. C., 827.
Norton v. *Bank*, 14 So. Rep., 872.
England v. *Dearborn*, 141 Mass., 590.
State Nat. Bank v. *Co.*, 68 Ill. App., 25.
Hadden v. *Linville*, 38 At. Rep., 37.

V.

A BILL OF SALE UNLESS FOLLOWED BY AN OPEN, NOTORIOUS AND VISIBLE CHANGE OF POSSESSION IS VOID. THE UNITED STATES COURTS WILL FOLLOW THE STATE LAW ON THIS SUBJECT.

Green v. *Van Buskirk*, 7 Wall., 139.
Hervey v. *Locomotive Works*, 93 U. S., 664.
Harkness v. *Russell*, 118 U. S., 663.

VI.

THE FINDING OF THE LOWER COURT AS TO THE WANT OF CHANGE OF POSSESSION IS CONCLUSIVE.

VII.

THE COURT'S FINDING IN THIS REGARD WAS CORRECT.

Martin v. *Duncan*, 156 Ill., 274.
Wright v. *McCormick*, 67 Mo., 426.
Mead v. *Noyes*, 44 Conn., 487.
Kirtland v. *Snow*, 20 Conn., 23.

12956

Norton v. *Doolittle*, 32 Conn., 405.
Fitzgerald v. *Gorham*, 4 Cal., 289.
Claflin v. *Roseberg*, 42 Mo., 439.
Mills v. *Thompson*, 72 Mo., 367.
Stewart v. *Nelson*, 79 Mo., 524.
Ticknor v. *McClellan*, 84 Ill., 474.
Gillett v. *Stoddard*, 30 Ill. App., 231.

VIII.

THE BILL OF SALE WAS IN REALITY A MORTGAGE AND WAS HENCE FRAUDULENT PER SE.

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.*, 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56.
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

IX.

THE BANK AND DOOLEY ARE ESTOPPED FROM ASSERTING ANY CLAIM TO THE PREJUDICE OF THESE CREDITORS.

Blennerhasset v. *Sherman*, 105 U. S., 100.
Bacon v. *Harris*, 62 F. R., 99.
Goll v. *Miller*, 54 N. W., 443.
Butler v. *Cockerill*, 73 F. R., 945.
Holden v. *N. Y. Bank*, 72 N. Y., 286.
Nevada Bank v. *Portland*, 59 F. R., 338.

ARGUMENT.

I.

THE FINDINGS OF THE ULTIMATE FACTS BY THE LOWER COURT CANNOT BE REVIEWED UPON APPEAL; THE FINDING OF THE LOWER COURT IS CONCLUSIVE.

Section 1011 of the Revised Statutes of the United States provides: "There shall be no reversal in the Supreme Court * * * for any error in fact."

Prior to the act of March 3, 1865, no decision by the court in the trial of a case at law, in which the jury had been waived, could be reviewed upon a writ of error, as to *any question* of fact or of law. By the provisions of that act, which have been embodied in Sections 649 and 700 of the Revised Statutes, the right of review is given in respect to rulings of the court in the progress of the trial of the case. And when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. The finding of the court upon the facts has the same effect as the verdict of a jury. *Distilling & Cattle Feeding Co.* v. *Gottschalk*, 13 C. C. A., 618.

In *Norris* v. *Jackson*, 9 Wall., 125, at 127 the court said:

"Whether the finding be general or special, it shall have the same effect as the verdict of a jury, that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law."

12957

In *Martinton* v. *Fairbanks*, 112 U. S., 670, at 674 the court said:

"The plaintiff in error seeks to raise the question whether the evidence set out in the bill of exceptions justified the finding by the court, for the plaintiff of the issues of fact raised by the pleadings. This is, in defiance of the decision of this court, that it cannot be done, an attempt upon the general finding to bring up the whole testimony for review by a bill of exceptions."

In *Stanley* v. *Supervisors*, 121 U. S., 535, at 547 the court said:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here, it matters not how convincing the argument that upon the evidence the finding should have been different."

In *Hathaway* v. *Cambridge Nat. Bk.*, 134 U. S., 494, at 498 the court said:

"The first three assignments of error allege errors merely in the findings of fact by the court. These errors are not subject to revision by this court if there was any evidence upon which such findings could be made."

In *Runkle* v. *Burnham*, 153 U. S., 216, at 225 the court said:

"Findings of fact made by the court below are binding here, if there be any evidence to support them."

In *St. Louis* v. *Rutz*, 138 U. S., 226, at 241 the court said:

"We cannot review the action of the Circuit Court in finding the facts which it did find and in refusing to find the facts which it was asked to find and did not find."

The plaintiff in error in this case has, however, simply ignored the above rule, and is asking the court to review the evidence, which (contrary to correct principle) is set forth in the special finding of facts, and to hold therefrom that the lower court drew incorrect conclusions of fact from such evidence.

Counsel asks this court to hold that the lower court found erroneously when it found that Chaffee had no authority to execute the bill of sale. Counsel does not purport, nor does the special finding of facts purport, to set forth all the evidence upon which the lower court made its finding, but yet even in the absence of a complete transcript of the evidence in the case he asks this court to assume the function of the lower court and find the ultimate fact differently.

In his brief which relates to this topic, counsel cites three cases. Cases cited in this connection would naturally be expected to contain some authority for the proposition that where a jury has been waived in a United States Circuit Court, the court of review may reverse the findings of fact which the lower court made, but the cases which counsel cites are upon an entirely different point.

The case of *Lewis* v. *Hartford Silk Co.*, 56 Conn., 25, was a chancery suit to foreclose a mortgage, and in this suit, as an incidental proposition, the question was raised whether, as a matter of fact, the president and general manager and *unlimited financial agent* of this particular corporation did have the power to pledge the manufactured products of such company from time to time, in order to raise money to prosecute its business *as a going concern.*

That being a chancery suit, the Supreme Court of Connecticut reviewed the entire evidence *de novo* for the purpose of ascertaining whether the lower court had found the facts correctly, and after a review of all the evidence found as a fact that he did have this power. Of course a finding of fact as to what power *the Hartford Silk Company* once conferred upon *its* unlimited financial manager

12953

cannot possibly throw any light upon the power which *the Natchaug Silk Company* conferred upon *its* president. (In passing, it may be of interest to note that that case was widely different from our own. There the officer was the unlimited financial agent of the company, having full authority to borrow money, etc., and the question was, whether he had the power from time to time to pledge goods in order to borrow money *for the purpose of conducting the business of the company as a going concern*, which money the company took and used in its business. That was not a case where the president of the company exercised his election as to which creditors the company should prefer *in case of insolvency.*)

The case of *Hayden* v. *Dooley*, cited in this connection, was a chancery suit arising out of the attempted transfer by Chaffee to Dooley of goods in New York (hereinabove referred to) made on the 23rd of April, 1895. In that case it appeared that, subsequently to the supposed transfer, Dooley, believing that Chaffee had no power to make such a transfer, attached the very goods which Chaffee had transferred to him and of which Dooley had taken possession, and he afterwards assigned part of his claim to Pangburn, so that the latter might also proceed to get a judgment lien upon these goods. Other attaching creditors secured a *temporary* injunction against Dooley and Pangburn, from which order Dooley appealed. The upper courts said that the questions raised by the appeal were of a character which could not be determined upon affidavits, and affirmed the order. Incidentally Judge Shipman remarked that the decisions in Connecticut *apparently* recognized that the president and general manager of a corporation had such power as Chaffee exercised. He further said that the question as presented

was one of law and might be controlled by the facts which might subsequently appear at the hearing, as to any limitation of Chaffee's powers of which the bank had knowledge. This, of course, was a mere dictum in view of the point decided. If the learned judge had considered a decision necessary on this phase of the case he would, we think, have decided that corporations in Connecticut are no different from corporations of other states, and that no court has the right to declare, *as a matter of law*, that the general manager of a Connection corporation is vested with a certain power, unless, *as a matter of fact*, the corporation has given him that power (leaving out questions of estoppel). One company may give its manager such power and another may not; there is no law which requires such power to be given. The only case which was cited to Judge Shipman on this point was the case of *Lewis* v. *Hartford Silk Co.*, *supra* (we have examined the brief written on this appeal). The Lewis case, as we have seen, does not decide any such point, but simply decides that in that particular case, under the particular circumstances there arising, the president of the corporation did have such power.

In the case of *Scudder* v. *Anderson*, 54 Mich., 122, cited by counsel, the general agent of the mining company transferred about $1,800 worth of personal property belonging to the company, in payment of an indebtedness to a third person. More than a year afterwards an execution creditor of the company levied upon the property in question and there was a trial of the right of property. Presumably the trial was before a jury, and a verdict was found against the execution creditor. In the upper court the point was made that there was *not sufficient evidence* of the agent's authority to transfer this property. The court said:

12959

"Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would prosumably be under the control of the general manager. *The point was not strenuously pressed.* We think it was well taken."

A consideration, therefore, of the cases cited by plaintiff in error shows that they indicate no reason for a variation in this case from the inflexible rule that this court will not review the findings of fact of the court below for the purpose of deciding whether the lower court found the facts correctly or not.

II.

THE QUESTION AS TO WHETHER OR NOT THE PRESIDENT OF THIS CORPORATION HAD BEEN GIVEN POWER TO TRANSFER ITS ASSETS BY WAY OF PREFERENCE IN INSOLVENCY, IS A QUESTION OF FACT AND NOT A QUESTION OF LAW.

The lower court, in its finding of facts, inserted the following clause:

"He (Chaffee) had never had authority vested in him at any time by the company to make this transfer or to make similar transfers, *unless the facts hereinbefore and hereinafter stated, as a matter of law, conferred upon him such authority.*"

In view of the above language, it will probably be argued that the question as to whether or not Chaffee had the power is a question of law, and hence reviewable in this court. But it is submitted that such a position is untenable.

There is no law which absolutely fixes and determines the powers of the president or the general manager of a corporation. Such questions depend upon considerations of fact, and vary with each particular case. An individ-

ual by the mere fact of being elected president or manager of a company does not, as between himself and the company, acquire any power to do any act binding upon the company. Reference must be had to the acts of the company through its stockholders or through its directors in order to determine what power they have conferred upon the agent. One corporation may determine to confer upon the president the power to do anything which the company could do within the scope of its charter; another company may determine and enact that the president shall have no power to do anything in behalf of the company, and that every exercise of volition which is to result in a binding obligation of the company must be made by the board of directors; other corporations may determine and enact that the president shall have certain powers, provided his act is joined in by the secretary, etc. In order to determine in any given case what power the president has, an examination must be made of the facts and a conclusion of fact drawn therefrom. Suppose that on the first day of January a certain corporation receives its charter, and on the same day holds a meeting and elects a president, secretary and treasurer, but with no definition as to their powers and duties, and that thereafter no further corporate action of any kind or nature is taken, the history of the corporation during the succeeding ten days being one of entire inaction, a perfect blank. On the 10th day of January the president executes in the name of the corporation a deed conveying away all its property. If a judicial determination is necessary as to whether the president did or did not have the power to make this conveyance, would not the determination consist simply in finding that the company had never conferred any power upon the president,

12960

and that he, therefore, had no power to make this deed, and would not this determination be a mere determination of fact, and not a question of law at all? *The law* is that if no power is granted to the president to convey away the corporate property, then no act of his can pass the title. *The fact* to be determined is whether the corporation has ever given the president such power.

In our case the lower court having found, as a fact, that Chaffee did not have this power, such determination is binding upon this court.

III.

IF THE QUESTION AS TO CHAFFEE'S AUTHORITY IS A MIXED QUESTION OF LAW AND FACT, IT CANNOT BE REVIEWED BY THIS COURT.

We think it can hardly, under any circumstances, be claimed that the question as to whether or not Chaffee had the authority to make this transfer is a *pure* question of law. If it is not simply a question of fact, then it must be a mixed question of law and fact which this court will not review.

In *Norris* v. *Jackson*, 9 Wall., 125, which was a lawsuit submitted to the court by stipulation, in speaking of this kind of submission the court said:

"This is in perfect analogy to the findings by a jury, for which the court is, in such cases, substituted by the consent of the parties. * * * Whether the finding be general or special it shall have the same effect as the verdict of a jury, that is to say, it is conclusive as to the facts so found. In the case of a general verdict which includes or may include, as it generally does, *mixed questions of law and fact, it concludes both*, except so far as they may be saved by some exceptian which the party has taken to the ruling of the court upon the law."

In the case at bar it would have been perfectly proper for the court, under instructions, to have submitted to the jury for a special finding the question whether or not this corporation had ever conferred upon Chaffee the power to make this transfer. If the jury had made a special finding that the corporation had never conferred this power upon the president it would be conclusive upon this court, even though such finding might involve a mixed question of law and fact. If such a finding by a jury would be conclusive, then, a similar finding by the court on a submitted case is equally conclusive, for the findings of a court in such a case stand on exactly the same footing as the verdict of a jury.

A perfect analogy to aid us in determining whether the upper court will, in a case of this kind, review a mixed question of law and fact, may be derived from the decision of cases arising under section 693 of the Revised Statutes, which provides that any final judgment in any civil suit which was tried before two judges at circuit, wherein the said judges certify that their opinions were opposed upon any question which occurred on the trial, may be reviewed by the Supreme Court.

Under this statute it has been held that the court will not review mixed questions of law and fact.

In *Dennistoun* v. *Stewart*, 18 How., 565, the court below certified that they were divided in opinion upon the following question:

Whether the firm of Dennistoun, Wood & Co., of New York, or the plaintiffs were bound to hold the said bill of lading for the shipment on the said Windsor Castle as a security for the bill of exchange described in the declaration, and whether any amount of loss arising to the said

12961

defendant from their failure to hold the said bill for the purpose of securing the proceeds of the cotton specified therein, for the payment of the bill of exchange described in the declaration, can be used as a defense against the bill, or any part thereof.

The Supreme Court decided that it would not review the question there certified, saying:

"Upon the trial in the Circuit Court the examination of witnesses was introduced and relied on, both by plaintiffs and defendants, to show the nature of the agreement upon which the cargo of the Windsor Castle was purchased, and upon which the plaintiffs consented to purchase, and did purchase, the bills drawn by the defendant upon Booth; the character of the security proffered and said to have been accepted in the bill of lading for the indemnity of the plaintiffs in purchasing the bills drawn upon Booth, and the obligation of the same plaintiffs not to surrender that security, nor to use it to the detriment of the defendant. The case was not placed before the judges upon any general or settled principle of the law merchant, nor was their opposition in opinion founded upon a case moulded and governed simply by that law, but they have divided upon a case *which was or might have been affected by facts heard in evidence*, the influence of which facts, as controlling the acts and obligations of the parties, fell peculiarly and properly within the province of the jury."

In *Jewell* v. *Knight*, 123 U. S., 426, the court said:

"The points certified must be questions of law only, and not questions of fact or of mixed law and fact, not such as involve or imply conclusions of judgment by the court upon the weight or effect of testimony of facts adduced in the cause. * * * The question of fraud or no fraud is one necessarily compounded of fact and of law. * * * The main issue in the case upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a

pure question of law, but a question either of fact or of mixed law and fact. * * * As was recently said by this court, speaking of questions certified in similar form: 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone'; and 'it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so.'"

Waterville v. *Van Slyke*, 116 U. S., 699, 704.

In *Smith* v. *Craft*, 123 U. S., 436, which was a similar case, the court said:

"The question of fraud or no fraud involved a question of fact, which, if this case had been on the common law side of the court, and either party had desired it, must have been submitted to a jury."

In *Fire Ins. Co.* v. *Wickham*, 128 U. S., 426, the court said:

"The second question certified is clearly obnoxious to the second and third rules; it asks us to decide whether, upon all the evidence in the case, the defendant was entitled to a verdict. This would require us to decide upon the weight of the evidence and the conclusions to be drawn from the facts."

We think the considerations presented under this and the preceding heading amply illustrate the principle we contend for, *i. e.*, wherever the decision of a question requires the court to consider the evidence and to weigh one fact against another in its determination, then the question must be a question of fact, or a mixed question of law and fact; and in neither of these cases will the upper court review the finding of the court below.

In our case the finding that Chaffee had no power to

12962

make this transfer necessarily involves a consideration of and a weighing of the various facts in evidence, and hence is not reviewable here.

IV.

WHETHER THE FINDING AS TO CHAFFEE'S AUTHORITY BE A CONCLUSION OF FACT OR A CONCLUSION OF LAW, THE CONCLUSION MUST BE THAT HE DID NOT HAVE SUCH AUTHORITY.

Assuming that we are wrong in our arguments under the two preceding headings, and that the question at issue is a question of *pure law* (although it involves a consideration of all the evidence in the case and a weighing of one fact against another), we now proceed to argue that the lower court reached a correct legal conclusion on the point. A vital distinction which we desire to impress upon the court is, that although Chaffee may have had the power to do any ordinary act in conducting the affairs of this corporation *as a going concern* for the profit of its stockholders, such as acts looking towards the proper manufacture of the goods and their proper sale and distribution, still he did not have the power to put an end to it as a going concern and convey away its assets.

When a corporation is organized and its owners are framing the rules for its conduct and laying out the duties of its servants they do not usually anticipate insolvency. It is not customary for a company at the beginning to lay out a scheme by which it shall be wound up in case of disaster. The stockholders usually look forward to a prosperous business career, and all acts done by them have that object in view. When a general manager is appointed it is for the purpose of having him do those

acts which the daily routine of business requires to be done. He is not selected with a view to his fitness to administer the corporate assets in insolvency.

An engineer is employed *to run* his engine; not to sell or dispose of it. A manager is employed to *manage* the business; not to stop it, and convey away all the assets.

If disaster overtakes a corporation it would naturally be supposed that *the owners* of the property would prefer to decide which of *their* friends should be favored by a preference. It would not be supposed that the owners would be willing that one of their *servants* should convey away *their* property to favor one of *his* friends.

When the manager has brought the corporation to a condition of insolvency it is time to relieve him from further service. The owners would then naturally desire to step in and decide how to wind it up, and how to distribute its assets. This was not the purpose for which they employed the manager. It would to them seem simply an impertinence for the manager to attempt to dispose of their property to favor his own friends.

Bearing these general considerations in mind, let us see what powers this corporation bestowed upon Chaffee.

The charter of the company provided that the stock, property and affairs of said corporation *should be managed by its directors.* If this positive statute had any meaning, it must have meant that any act requiring volition or the exercise of discretion in any manner outside of the usual routine of business must be done by the board of directors.

This statute was a positive prohibition against conferring upon Chaffee the power to decide when the corporate business should stop, and to whom its assets should be conveyed by way of preference.

The president of the corporation seems to have had no power, except to preside at meetings. (The general management of the company was entrusted to the general manager.) The by-laws provided that "the president shall preside at all meetings; * * * he shall also perform all duties especially required of him by the laws of this state; but his charge of the executive business of the company shall be subject to the control of the directors."

This by-law was not a grant of power. It did not confer upon the president charge of the executive business. But it did impose a limitation upon the directors which would *prevent* them from giving the president any charge of the executive business, except subject to their approval.

Observe also the words "executive business." An act of volition is not executive business.

These are all the facts which throw any light upon the duties and powers of *the president*. It is quite plain from the foregoing that no power was conferred upon *him* to convey away the assets of the company by way of preference in insolvency.

The by-laws also provided for the annual election of a general manager "who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

It must be borne in mind in connection with this by-law that Chaffee had nothing whatever to do with the financial management of the company; that is, with the borrowing of money, and with the arrangements for securing its creditors, etc. All this part of the management of the company was done by Risley down to the

day of his death, which was a few days before the dissolution of the company.

All the negotiations with this bank and all arrangements made with them in regard to the borrowing of money and giving of the security were conducted by Risley.

Chaffee's duties consisted exclusively in looking after the manufacture of the goods and their distribution to the various branch houses.

The foregoing constitute all the acts of the company by which any grant of power was made to Chaffee as *general manager*.

Can it for a moment be contended that a by-law conferring upon a general manager entire charge of the business of the company could be construed to be a grant of power to the manager, in case insolvency should overtake the corporation, to convey away all the assets to one of his friends? It certainly would be a remarkable stretch of construction to say that a by-law adopted at the beginning for the guidance of the company made the general manager all during the existence of the company the repository of the power to determine in case of dissolution which creditor should be preferred.

It seems perfectly plain that the scope of this by-law was simply to confer the power to do those things in the management of the affairs of the company which the daily routine of its business as a going concern demanded.

It must be borne in mind that the distribution of the assets in insolvency is not a *general* duty. It is a unique and special function which in the nature of things can only be performed once in the history of any corporation.

These being then the only *grants of power* to Chaffee, what did Chaffee *do?*

The facts as found by the court are, that Chaffee—

"Had had entire charge of the current business and affairs of said corporation *as a going concern*, and within the fields of its activities *as a going concern*, and had been permitted by his board of directors to manage, as he saw fit, the current business and affairs except that Risley had charge of the financial affairs of the company and of the borrowing of money, and except that Chaffee consulted the board of directors when any act out of the usual routine of business was to be done, such as hiring an extra office and insuring the accounts of the company, in purchasing or mortgaging real estate and in determining the policy of the company in times of strikes." (Rec., p. 11, Par. 7.)

"He had never made a transfer similar to this. He had never, during the business career of the company, done any act on behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets by way of preference in case of impending dissolution." (Rec., p. 15; Par. 18–21.)

The bank knew and Dooley knew that this was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company. (Rec., p. 15; Par. 19.)

Thus we find from the review of the facts connected with this case that this corporation was expressly prohibited by statute from conferring upon any individual the power which Chaffee exercised in this case.

We find that the company never, in fact, conferred upon him any such power, but simply gave him the power to manage his daily routine of the business as a going concern.

We find as a matter of fact that he never had anything to do with this part of the business of the company—that is, with the arrangements for borrowing money and securing it; and we find, in fact, that he never did any act similar to this.

T[illegible] conclusions seem to make it absolutely impossible [illegible] hold that Chaffee had the power to make this preference. If the corporation never conferred this power upon him, then the bill of sale which he executed would have no more effect in transferring the title to the goods than would a bill of sale of the same goods executed by the writer of this brief.

The principles which we are here insisting on are illustrated by the following cases:

In *First Nat. Bk.* v. *Co.*, 116 N. C., 827, one Avery was the treasurer of the company and had practically the entire charge of the management of its business. He sold all the furniture manufactured at the works of the company and used the proceeds of sale for the benefit of the company in carrying on its general business. He was to stay at Asheville to run the business. From the formation of the company he had charge of it, managed it, sold its furniture, borrowed money for it and paid its debts. This he had done for two years. He managed all the affairs of the company.

The company, being pushed by one of its creditors, he transferred the entire stock of manufactured goods then on hand at the Asheville branch in payment of the indebtedness of a certain creditor.

The court said:

"We think that the agent Avery transcended his powers as claimed for himself by his own testimony when he attempted to make such a disposition of the property of the corporation as this transaction discloses, and therefore that no title to the property passed to the intervenors in the attempted sale. Avery claimed, and the testimony shows, that he had very large powers in the *active* management for which the company was organized, the manufacture and sale of furniture, but we cannot find from a

12965

reading of the whole testimony that the company ever entrusted him with the power to do what he attempted to do in the transaction above set forth. His agency concerned the *running* and *continuation* of the business. *By his act he practically put an end to it.* Under his powers he was to sell the product of the defendant manufacturing company, purchase material for its use, borrow money and pay its debts. He was not authorized to take the entire stock of furniture and also a large quantity of lumber, agree upon a value for it with certain of the creditors of the corporation, turn the property over to them and have the value placed upon its indebtedness, some of which was not due as a credit, which thing he did. * * * However broad may be the general power of an agent to conduct the business of a manufacturing corporat on, it cannot, in reason, be extended to cover such a transaction as the one which the agent in this matter attempted to perform."

In *Norton* v. *Alabama Nat. Bk.*, 14 Southern, 872, the president of a grocery company was one L. B. Jordan. His wife was secretary of the company and also a director, and his brother was a director. These three persons were the sole corporators and stockholders. The evidence showed that L. B. Jordan told his wife, who was secretary and a director, that unless he could borrow money on that day he would be compelled to make an assignment, and she replied, "Do the best you can." The other director was absent from the city. During that day, the president of the company executed, in the name of the company, a general assignment for the benefit of its creditors. *Held*, that the president of the company had no authority to make this transfer and that title did not pass thereunder. The court said:

"It is a generally recognized principle of law that the president of a corporation, or its general manager, without authority of its board of directors, cannot make a valid conveyance or assignment of the property of the corporation."

(It will be noted that in this case the conveyance was made for the benefit of all the creditors ratably. If the president had no power to make such a conveyance, *a fortiori*, he would have no power to make a conveyance as a preference to one individual creditor.)

In *England* v. *Dearborn*, 141 Mass., 590, one William H. England owned ninety-eight shares of the stock of a manufacturing corporation; his wife owned one share, and one Whitman owned the only remaining share. Thus England owned practically all the stock. He and Whitman were the only directors. England was president and general manager of the company England executed, in the name of the company, a mortgage of all its property to secure a creditor, and it was held that he had no such power. The court said:

"There is nothing in this case from which previous authority or subsequent ratification can be inferred, except the fact that William H. England was made president, treasurer and general manager of the corporation. Authority to sell or mortgage all the property of a corporation, except its book accounts, *cannot be one of the ordinary incidents of carrying on the business* of a manufacturing corporation. The extent of the judicial knowledge which courts have taken of the customary powers of different officers of corporations need not be discussed, for it cannot be held to be within the implied powers of any officer of a manufacturing corporation to convey away all its property, except in book accounts."

In *State National Bank* v. *Moran Packing Co.*, 68 Ill. App., 25, the president and secretary of the company had executed a mortgage of all the corporate property to secure one creditor. The court said:

" In this state it has long been the rule that the president of a corporation is presumed to have authority to transact for the corporation business of *an ordinary nat-*

12966

ure, arising in the routine of affairs, such as custom or necessity has imposed upon the office.

* * * * *

We are of the opinion that the president and secretary of such a company as was this have not, by mere virtue of their offices, authority to transfer substantially all the property of the corporation to certain creditors by way of preference to them, and that the company was not bound by and might avoid such conveyances.

The transaction was not one within the ordinary or usual course of the business of the company; neither was it such as custom has sanctioned, or the ordinary carrying on of business made necessary. *Winsor* v. *Bank*, 18 Mo. App., 665; *Hyde* v. *Larkin*, 35 Mo. App., 366; *McKeag* v. *Collins*, 87 Mo., 164; *Hoyt* v. *Thompson*, 5 N. Y. (1st Selden), 320; *Bank* v. *Asheville Furniture Co.*, 116 N. C., 827; *Coke* v. *National Association*, 35 Ill. App., 465."

The precise question under consideration was determined in the Supreme Court of Maryland, *Hadden* v. *Linville*, 38 At. Rep., 37, where the validity of Chaffee's transfer to Dooley of the goods in Baltimore was brought in question. That case arose, as this does, on a contest between the attaching creditors and Dooley. In that case, in speaking of Chaffee, the court said:

"On the 22d April, he proceeded to New York and transferred all the company's goods, including those he had sent there the week before, to the bank on account of his company's indebtedness to the latter; thence he went to Chicago and Baltimore, and at each place made a transfer of all the goods held there—thus placing all the property of the company outside of the State of Connecticut (so far as the record discloses) in the hands of the bank. It is obvious such transfers were not made in the usual course of business, but solely for the purpose of devoting all the assets within his control (a receiver having been appointed for the company in Connecticut on the 26th of April) to the discharge of the antecedent claim of the bank; thus constituting, of his own will, the bank

a preference creditor of his insolvent company. The twelfth by-law of the company provides for the election of a general manager, 'who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors.' This by-law, by a reasonable construction, confers full power to do all things and make all contracts that are needed in transacting *the ordinary business of the corporation* within the legitimate scope, objects and purposes of its organization; *but not such authority as that he may deal at his own pleasure with the assets outside the regular course of business.* Nor does it appear from anything contained in the record that Chaffee had ever arrogated to himself such extensive authority. Prior to the transaction in question he had never undertaken to dispose of the property of the company, otherwise than in the regular course of business. This case is clearly distinguishable from one where the managing officer had disposed of the property for the purpose of procuring credit for his company; there are cases where that is held to have been a proper exercise of his authority; *Fay* v. *Noble*, 12 Cushing, 1; *Lewis* v. *Hartford Silk Co.*, 56 Conn., 36; but with that question we are not now called upon to deal. In this case the transfer was for the purpose of securing or paying an antecedent debt. Chaffee's authority under the by-law, and under that he was permitted to exercise in the management of the affairs of the company, was conferred upon him for the purpose of enabling him to properly and successfully conduct the business, to keep the company a going concern, with capacity to earn a profit for its stockholders; not that he might, after the company became insolvent and was about to go into the hands of a receiver, parcel out its assets or any portion of them among such of the creditors as his caprice or interest might lead him to select. An authority like this has never been accorded, as far as we are informed, to any officer charged with the conduct of the affairs of the corporation, whether he be called president, general manager, or by any other name, unless there had been conferred upon him a prior express authority by the directors or stockholders of the company."

12967

We have cited above sufficient cases amply to illustrate the rule which we contend for as being applicable to this case. Mere multiplication of authorities is useless. If the principle does not commend itself to the judgment of this court, additional authorities would have no value. We think the foregoing consideration and authorities, however, make it quite plain that Chaffee had no power to make the transfer in question, and that no title passed under the bill of sale.

But it is claimed that the cases of *Lewis* v. *Co.*, 56 Conn., 25; *Hadden* v. *Dooley*, 74 F. R., 429, and *Scudder* v. *Anderson*, 54 Mich., 122, are contrary to our position.

In the Lewis case the question was raised whether, as a matter of fact, the president and general manager and *unlimited financial agent* of this particular corporation did have the power to pledge the manufactured products of such company from time to time, in order to raise money to prosecute its business *as a going concern.*

The question there presented was widely different from the question presented here. There the officer was the *unlimited financial agent* of the company, having full authority to borrow money, etc., and the question was, whether he had the power from time to time to pledge goods in order to borrow money to use in the ordinary course of business. That was not a case where the president of the company exercised his election as to which creditors the company should prefer in case of insolvency.

The case of *Hadden* v. *Dooley*, cited in this connection, was a chancery suit arising out of the attempted transfer by Chaffee to Dooley of goods in New York (hereinabove

referred to), made on the 23rd of April, 1895. In that case it appears that subsequently to the supposed transfer Dooley, believing that Chaffee had no power to make such a transfer, attached the very goods which Chaffee had transferred to him and of which Dooley had taken possession, and he afterwards assigned part of his claim to Pangburn, so that the latter might also proceed to get a judgment lien upon these goods. Other attaching creditors secured a *temporary* injunction against Dooley and Pangburn, from which order Dooley appealed. The upper court said that the questions raised by the appeal were of a character which could not be determined upon affidavits, and affirmed the order. Incidentally Judge Shipman remarked that the decisions in Conneticut *apparently* recognized that the president and general manager of a corporation had such power as Chaffee exercised. He further said that the question as presented was one of law and might be controlled by the facts which might subsequently appear at the hearing, as to any limitation of Chaffee's powers of which the bank had knowledge. This, of course, was a mere dictum in view of the point decided. If the learned judge had considered a decision necessary on this phase of the case he would, we think, doubtless have decided that corporations in Connecticut are no different from corporations of other states, and that no court has the right to declare, *as a matter of law*, that the general manager of a Conneticut corporation is vested with a certain power, unless, *as a matter of fact*, the corporation has given him that power (leaving out questions of estoppel). One company may give its manager such power and another may not; there is no law which requires such power to be given. The only case which was cited by Judge Shipman on this point was the

12963

case of *Lewis* v. *Hartford Silk Co.*, *supra* (we have examined the brief written on this appeal). The Lewis case, as we have seen, does not decide any such point, but simply decides that in that particular case, under the particular circumstances there arising, the president of the corporation did have such power.

In the case of *Scudder* v. *Anderson*, 54 Mich., 122, cited by counsel, the general agent of the mining company transferred about $1,800 worth of personal property belonging to the company, in payment of an indebtedness to a third person. More than a year afterwards an execution creditor of the company levied upon the property in question and there was a trial of the right of property. Presumably the trial was before a jury and a verdict was found against the execution creditor. In the upper court the point was made that there was *not sufficient evidence* of the agent's authority to transfer this property. The court said:

"Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would presumably be under the control of the general manager. *The point was not strenuously pressed.* We think it was well taken."

These cases, therefore, when closely examined, are found not to be any authority against the proposition we contend for.

V.

THE ILLINOIS LAW IS THAT A BILL OF SALE WHERE THERE IS NO OPEN AND NOTORIOUS CHANGE OF POSSESSION UNDER IT IS FRAUDULENT AND VOID. THE UNITED STATES COURTS FOLLOW THE POLICY OF THE STATE LAW IN CASES OF THIS KIND.

It was in an early case decided by the United States Supreme Court that a transfer of chattels without a change of possession was fraudulent *per se* (*Hamilton* v. *Russell*, 1 Cranch, 309). In a later case (*Warner* v. *Norton*, 20 Howard, 448) the court gave some consideration to that point and rather indicated that they thought the best rule was that a want of change of possession was not fraud *per se*. But they expressly refrained from overruling *Hamilton* v. *Russell*, saying: "The case before us is not similar to that of *Hamilton* v. *Russell*." The Warner case was decided upon the ground that there was evidence tending to show a change of possession, and the verdict of the jury on that subject could not be overturned. A careful reading of this case will show that it is not a clear-cut decision to the effect that an absence of change of possession is merely *prima facie* evidence of fraud.

But whatever may be said as to what was decided in *Warner* v. *Norton* (decided in 1867) there is no doubt but that the Supreme Court has since that time clearly laid down the rule that the United States courts will follow the policy of the state in cases of this kind. And if such policy is to the effect that a transfer of personal property without change of possession is fraudulent *per se*, that rule will be applied in cases coming from that state, no

1296

matter what rule might be applied in cases coming from other states.

In *Green* v. *Van Buskirk*, 7 Wall., 139, there was a controversy between a mortgagee who had not taken possession and a subsequent attaching creditor. The court said:

"The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. * * * It is clear that if Van Buskirk had selected Illinois instead of New York to test the liability of these safes to seizure and condemnation on the same evidence and pleadings, their seizure and condemnation (under attachment proceedings) would have been justified. * * * And as the effect of the levy, judgment and sale is to protect Green, if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in court of another state for the same transaction and he justifies in the same manner that he is also protected. Any other rule would destroy all safety in derivative titles and deny to a state the power to regulate its personal property within its limits."

In *Hervey* v. *Locomotive Works*, 93 U. S., 664, the court held that "the policy of the law in Illinois will not permit the owner of personal property to sell it either absolutely or conditionally and still continue in possession of it," * * * and the property "while in possession of C. & Co., who exercised complete ownership over it, was seized and sold in the local courts of Illinois as their property. These proceedings were valid in the jurisdiction where they took place and must be respected by the Federal tribunals."

"The Rhode Island Locomotive works took the risk of losing its lien in case the property while in the possession of C. & Co. should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien."

In *Harkness* v. *Russell*, 118 U. S., 663, a case arose from Utah involving the question as to whether a want of change of possession was fraudulent *per se* or whether it was merely *prima facie* fraud. The court discussed this subject at great length and decided that in this case coming from Utah such a state of affairs was not fraudulent *per se*. The court referred to the Green case and the Hervey case as determining the general principles that the policy of Illinois will not permit the owner of personal property to sell it and still remain in possession of it, and said that the Hervey case merely decided: First, that that case was to be governed by the law of Illinois, the place where the property was situated; and, second, that by the law of Illinois such transactions were void.

See, also, *Pullman* v. *Co.*, 141 U. S., at page 22.

As plaintiff in error does not deny that the law of Illinois is that a lack of change of possession renders a bill of sale void, no further argument need be made on this point.

VI.

THE FINDING OF THE LOWER COURT THAT THERE WAS NO OPEN, VISIBLE OR NOTORIOUS CHANGE OF POSSESSION IS NOT REVIEWABLE IN THIS COURT.

The court below found:

"There was no change in the title to or possessions of said goods which was visible, open or notorious, down to the date of the attachment, unless the facts hereinafter and hereinbefore specifically stated did, as a matter of law, constitute a visible, open and notorious change of possession."

The question as to whether or not the change of pos-

12970

session was visible, open or notorious is a question of fact, and hence is not reviewable here.

If however the court should not agree with us in treating this finding as one of fact and if the court should be of opinion that it is a finding of law, then we suggest the following considerations.

VII.

THE COURT WAS RIGHT IN FINDING THAT THERE WAS NO VISIBLE, OPEN AND NOTORIOUS CHANGE OF POSSESSION.

The rule requiring a visible change of possession was not made for the protection of either the grantor or the grantee; they can take care of themselves. But this rule was made for the protection *of the public.* The policy of Illinois, figuratively speaking, requires that there should be *three parties* to every transfer of personal property in this state. These parties are, 1st, the grantor, 2d, the grantee, and, 3d, the public. The third party is required to be notified of the transaction for its own protection.

In this case the third party was entirely omitted from the transaction, and its rights were ignored. Hence, the transaction is void. In considering what was done here it will be seen that every step taken was taken for the benefit of the second party. The steps which should have been taken for the benefit of the third party, the public, were not only omitted, but they were *purposely omitted.*

A bill of sale was made out and delivered to an attorney for the grantee. The grantee then theoretically took possession of the goods and theoretically redelivered the goods to Stanton and took his receipt.

Then a new set of books was opened. These were all acts that took place within a private office. The public knew nothing about them. They were all acts done for the protection of the grantee against the grantor. Nothing was done for the protection of the public. Wherever the public might come in contact with the transaction it was *purposely hidden*. No member of the public who entered the store was informed either by the signs (inside or out) or by word of mouth that any change had been made. The salesmen, who knew of the transfer, were instructed to keep it secret from the public, and in fact sold the goods as the goods of the Silk Company, and orders kept coming in up to the time of the attachment, addressed to the Silk Company, procured at the solicitation of salesmen on the road.

The same employes, exactly, remained in the store selling goods over the counter as though nothing had happened. The same office fixtures were used, including the safe. None of these fixtures had ever been transferred to Dooley. All the new books and papers were put every night in the safe, which still belonged to the Silk Company and had its name painted on it in large letters.

When goods were shipped to customers in filling orders which had come in addressed to the Silk Company bills were sent in the name of Stanton as agent for Dooley. This was done entirely for the protection of the grantee, to prevent remittances being made to the grantor. It was not done for the benefit of the public. These bills were not public notices. They did not purport to notify anyone of anything. They did not inform anybody that that stock of goods had been transferred to anyone. They simply informed the recipient that an order which had been sent to Chicago to the Silk Company had been

1297

appropriated and filled by another person, leaving the recipient to guess why this was done. We cannot think that the policy of the law which requires notice to the public for the protection of the public will be satisfied by this transaction, which was carried through with the admitted purpose of deceiving the public. To show the policy of the law and to illustrate the fact that the rule exists for the benefit of the public, the following cases may be cited:

In *Martin* v. *Duncan*, 156 Ill., 274, the agent of the former owner remained in the store selling the goods, and although, as between the parties, everything was done to make the transfer valid, the books were properly kept, etc., still the court held the change in possession was not sufficiently obvious to protect the public. The court said:

"Up to May 16th, Robert had been in possession as agent for his brother, and if on May 28th he was in possession for himself the change in the character of possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods. * * * When the known and previously recognized agent of an alleged vendor remains in possession the appearance to the world is the same as though the vendor himself remained in possession unless there are substantial and visible signs of a change of title."

In *Wright* v. *McCormick*, 67 Mo., 426, the signs were not changed, although as between the parties the transfer was good. The same clerks remained in charge. The court said the facts were "insufficient to notify the community at large, or the regular customers even, that there had been a change of possession. The retention of the sign amounted to a declaration to the public that Doherty was still the proprietor."

In *Mead* v. *Noyes*, 44 Conn., 487, where there had

been a transfer ample as between the parties, but where the vendee allowed the vendor to exercise certain acts of ownership, the court held the conveyance void, saying:

"Who would a stranger have considered in possession in this case, he would have seen, etc. * * * We are unable to discover anything which would lead a stranger to the sale to suppose there had been a change in possession and ownership of the property."

In *Kirtland* v. *Snow*, 20 Conn., 23, the court say:

"This court has repeatedly said that the rule of law which requires the vendee of personal property to take and retain the possession of it, in order to protect it from the vendor's creditors, is a rule of policy as well as of evidence, its object being to prevent fraud by taking away the temptation to commit it. * * * The rule is founded upon the presumption that a purchaser will naturally perfect his purchase by taking possession. The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view; and his neglect to take possession is, therefore, so unusual and contrary to general experience as to be very strong evidence that the purchase was only colorable and not real. And the reason of extending it from a mere rule of evidence, calling it a badge of fraud only, and arbitrarily declaring, as a matter of law, that it renders the sale void as to creditors, notwithstanding the highest evidence of the honesty of the sale, is, because it has been thought better to take away the temptation to practice fraud, than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest."

In *Norton* v. *Doolittle*, 32 Conn., 405, the court said:

"The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. * * * The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible and continued change of possession. * * * And, as in applying the rule we must look beyond the good faith, or the secret, technical features of the transaction, so purchasers must

12972

learn and understand that if they purchase property, and without legal excuse permit the possession to remain, in fact, or apparently or visibly, the same, or if changed for a brief period, to be in fact or apparently and visibly restored and thereafter in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debt of the vendor, as still, to the view of the world and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."

It is needless to quote from other cases. The policy of the law is, however, amply shown also in the following cases:

Fitzgerald v. *Gorham*, 4 Cal., 289.
Claflin v. *Roseberg*, 42 Mo., 439.
Mills v. *Thompson*, 72 Mo., 367.
Stewart v. *Nelson*, 79 Mo., 524.
Stephens v. [illegible], 15 Cal., 503.
Ticknor v. *McGrellis*, 84 Ill., at 474.
Gillett v. *Stoddard*, 30 Ill. App., 231.

The case of *Warner* v. *Norton*, *supra*, cannot be taken to be any authority in this case on the question of change of possession, because the law as apparently indicated by the decision in that case has been changed by the later cases cited. And on the question of fact as to whether or not there has been a change of possession, that question was settled in that case by the verdict of the jury. The finding of the jury in *that case* that there *had* been a change of possession has no weight in this court at this time in determining whether there has been a change of possession in *this case*.

These considerations and authorities show that the lower court found correctly on this issue.

VIII.

AN ABSOLUTE BILL OF SALE INTENDED AS A MORTGAGE IS FRAUDULENT PER SE.

The bill of sale was given as security. No part of the debt was canceled. In the claim filed by Dooley against the Silk Company, no allowance was made on the indebtedness by reason of the Chicago transfer. It was intended as a mortgage and hence is void *per se.*

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.* 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56,
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

IX.

THE BANK AND DOOLEY ARE ESTOPPED FROM ASSERTING THE CLAIM OF THE BANK IN ANY FORM TO THE PREJUDICE OF THE PERSONS WHO WERE DECEIVED BY THE BANK'S FRAUDULENT STATEMENTS.

It has been found as a fact in this case that the cashier of the bank made up false statements regarding the condition of the Silk Company for the purpose of deceiving the attaching creditors, and that by means of these fraudulent statements raw silk was gotten from these attaching creditors upon credit, which credit they would not have given unless deceived by such statements, and that the

12973

entire amount of the claims upon which the attachments were sued out was for the raw silk furnished on the faith of these fraudulent statements.

The statements were fraudulent and false in that Risley knew the indebtedness of the bank, and knew that this large indebtedness rendered the Silk Company insolvent; but in the statements he falsely and fraudulently concealed this fact. The statements represented that the Silk Company was $200,000 better off than it really was.

The bank concealed the insolvency of the company and concealed the fact that its own large claim rendered the *company insolvent*, for the purpose of deceiving these creditors. In *Blennerhassett* v. *Sherman*, 105 U. S., 100, the court held:

"Where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails, and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."

We will simply refer to the following cases as sustaining our proposition, and showing that the bank and Dooley are bound by the fraudulent acts of the bank's officers, and are now estopped to assert their claim:

Bacon v. *Harris*, 62 F. R., 99.
Goll v. *Miller*, 54 N. W., 443.
Butler v. *Cockerill*, 73 F. R., 945.
Holden v. *N. Y. Bank*, 72 N. Y., 286.
Nevada Bank v. *Portland*, 59 F. R., 338.

X.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY RATIFICATION OF CHAFFEE'S ACT IN MAKING THIS TRANSFER.

The bill of sale to Dooley was made on April 25. No attempt was made to take possession until the 26th, but by that time a receiver had been appointed by a court of competent jurisdiction in Connecticut "of all the property, estate and rights of said Natchaug Silk Company." (Rec., p. 17; Par. 13.) All functions of the board of directors, so far as they could affect the property of this corporation, were suspended by the appointment of this receiver. Three days after the appointment of the Connecticut receiver, when Chaffee had returned to Willimantic, he, together with Lucas, Dooley's attorney, applied to the directors and asked them to ratify the transaction, "but said directors declined to take any action whatever in regard thereto." (Rec., p. 19; Par. 32.) It certainly cannot be claimed that the directors ratified this act by an express refusal to do so.

Of course the receiver could not ratify such act, because that would be directly opposed to his duties in the premises. The duty of the receiver was to gather in all the assets and protect all the rights of the corporation for the benefit of all creditors equally. If the receiver was vested with the right to disaffirm Chaffee's act and thus resume title to the goods, he certainly would have no power to waive the right in favor of any one individual creditor and to the detriment of the general creditors in whose interest he was appointed.

12974

XI.

IF THE BILL OF SALE DID NOT CONFER A TITLE UPON DOOLEY, THE TITLE STILL REMAINS IN THE CORPORATION, AND CREDITORS OF THE CORPORATION HAVE A RIGHT TO ATTACH.

It is claimed by plaintiff in error that even if the bill of sale did not confer title on Dooley no advantage of this fact could be taken by attaching creditors. He cites as authority for this proposition four Pennsylvania cases, which upon examination are found not to deal with the point at all.

Drexel's Appeal, 6 Pa. St., 272, was a case where a judgment had been irregularly entered, and a motion was made by a stranger to the record to vacate the judgment. The court held that a stranger to the record had no standing to move to vacate the judgment. If the defendant was willing to submit to it, nobody else could complain.

In the case of *Gordon* v. *Preston*, 1 Watts, 385, it was held that a mortgage originally invalid was ratified by the subsequent action of the company.

In *Hauer's Appeal*, 5 W. & S., 473, it was held that even though a judgment had been irregularly entered against an individual on a warrant of attorney, still a stranger to the record could not maintain a motion to set it aside.

In *Johnson* v. *Miller*, 174 Pa. St., 605, a subsequent attaching creditor attacked the validity of a sale of some of the corporate property. No reason appeared why the mortgage was invalid. The court said:

"The sale was effected by means of a written instru-

ment regularly executed by the proper officers of the company in pursuance of a resolution of the board of directors. At the meeting of the board five of the eight members were present and the action was unanimous, and has not since been objected to by anyone interested in the company. Under the circumstances disclosed by the testimony the appellant has no standing to question it."

Respectfully submitted.

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